

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-vs-

15-CR-2

JASON M. SMITH,

Defendant.

Proceedings held before the

Honorable Jeremiah J. McCarthy,

Robert H. Jackson Courthouse,

2 Niagara Square, Buffalo, New York,

on September 22, 2015.

APPEARANCES:

SCOTT ALLEN,
Assistant United States Attorney,
Appearing for the United States.

DOMINIC SARACENO, ESQ.,
Appearing for Defendant.

AUDIO RECORDER: Deborah A. Zamito

TRANSCRIBER: Michelle L. McLaughlin, RPR,
Court Reporter,
(716)332-3560

(Proceedings recorded by electronic sound
recording, transcript produced by computer.)

1 THE COURT: Good afternoon. Please be
2 seated.

3 MR. SARACENO: Good afternoon, your Honor.

4 THE CLERK: On the record. This is United
5 States versus Jason M. Smith, case number 15-CR-2.
6 For the government, Scott Allen. For the
7 defendant, Dominic Saraceno. The defendant is
8 present.

9 We are here for oral argument before the
10 Honorable Jeremiah J. McCarthy.

11 THE COURT: Good afternoon, Mr. Smith.
12 Good afternoon, counsel.

13 MR. SARACENO: Good afternoon, your Honor.

14 THE COURT: Okay. Mr. Saraceno, it's my
15 understanding from communications with you
16 yesterday that the issue you want to argue is the
17 search warrant?

18 MR. SARACENO: Correct, your Honor. With
19 regard to the rest of the items outlined in my
20 motion, I think I can just rest on the paperwork
21 and the response from the people, and the Court can
22 make a decision based off of that.

23 THE COURT: Okay. Well, before -- is
24 there any -- based on the government's response, is
25 there any -- any aspect of your motion that you

1 consider to be satisfied or moot?

2 MR. SARACENO: Yes. I'd still be looking
3 for a Bill of Particulars, but --

4 THE COURT: Okay.

5 MR. SARACENO: But items two, three, four,
6 five, six, eight are -- I would consider satisfied.

7 THE COURT: Well, eight is the suppression
8 of physical --

9 MR. SARACENO: I'm sorry, not eight, nine.
10 Sorry, your Honor.

11 THE COURT: Okay. Nine.

12 MR. SARACENO: The oral statement.

13 THE COURT: Okay. So basically what
14 remains is Bill of Particulars and the challenge to
15 the search warrant, correct?

16 MR. SARACENO: Yes. And I do have a few
17 brief comments I'd like to make on the
18 identification as well.

19 THE COURT: Okay. All right.
20 Identification, which item is that?

21 MR. SARACENO: That would be my motion for
22 suppression of identification. There was a
23 photo -- eight-pack photo array used by the Town of
24 Lancaster Police Department.

25 THE COURT: Okay. Well, let's take up the

1 warrant first, and then we'll go to that.

2 MR. SARACENO: Sure. Well, your Honor,
3 with regard to the warrant, it's our position that
4 these are more than just mere omissions on the
5 detective's part when -- when forwarding the
6 warrant application to Judge Wolfgang. Not only --
7 I understand that the government provided an
8 explanation for why the defendant might not have
9 been noticed in the Burger King video. They also
10 provided an explanation for why the defendant might
11 not have been seen in the Dollar Store videos.

12 However, after reviewing the response, couple
13 of other items became apparent that I think
14 corroborate our position that the -- that the law
15 enforcement officials should have been more
16 forthcoming with the issuing judge. And as an
17 example I would point out that in their response
18 they indicate that the law enforcement took -- they
19 assumed the Meetme account of one of the victims in
20 the matter, and that Mr. -- they claimed that the
21 defendant called back from an 837 number, and then
22 the last four digits in the motion are X'd out.

23 However, if you look in the Lancaster Police
24 Department police report that's dated
25 February 16th, 2014, on page 1, it says that the

1 number actually came from a completely different
2 number, the call-back number says 836-2761, not an
3 837 number. This is an inconsistency that perhaps
4 Judge Wolfgang should have been made aware of.

5 The other important things that we submit Judge
6 Wolfgang should have been told about prior to
7 making her decision about whether or not to issue a
8 warrant was the fact that the victim claims she was
9 at the defendant's house and that she recognized
10 the house from the Zillow.com pictures, and she
11 especially recognized the red rug. But what they
12 don't tell the Judge was that the victim claimed
13 that she was drinking rum at the defendant's house
14 and that they had sex in his room.

15 The law enforcement officials took the bottle
16 of rum, swabbed it for her DNA. Came back
17 negative. They swabbed the bed sheets for DNA. No
18 trace of her DNA was found on the bed sheets
19 either. And they also, that same night, sent her
20 for a rape kit test, and it was negative for the
21 defendant's sperm.

22 These are not just minor omissions, in our
23 opinion, that aren't really relative or relevant to
24 the issue of whether or not there was probable
25 cause to issue a warrant.

1 THE COURT: Didn't the application state
2 that the female said he was -- that he was using a
3 condom?

4 MR. SARACENO: Well, it might have, your
5 Honor, but how would that explain the fact that
6 none of her DNA was in the bed sheets? And our
7 point is these are -- these are valuable pieces of
8 information that the judge should have been made
9 aware of. They're not harmless omissions. These
10 are significant substantial factors that I would
11 think a judge would want to know when deciding
12 whether or not to issue a warrant.

13 THE COURT: Okay. Okay.

14 MR. SARACENO: And then with regard to the
15 identification --

16 THE COURT: Let me hear from Mr. Allen
17 first on the -- just on the warrant.

18 MR. ALLEN: Your Honor, with respect to
19 the last point that was made with regard to the
20 forensic test, this is the first time I'm hearing
21 that argument, so I'm reviewing the papers as we
22 go. But I believe the affidavit predated the
23 results of any forensics that we're talking about
24 here. So if that's the case, then the affiant
25 would not have had the benefit of knowing the

1 results of those tests when applying for this
2 warrant. But before I make -- from what I'm seeing
3 here, if I'm relying upon the same report that I
4 believe defense counsel is, I believe the biology
5 analysis report, from what I'm seeing, comes around
6 May 28th of 2014, and the affidavit was signed on
7 April 8th, 2014. So it predated it by roughly six
8 weeks, if I'm reading this correctly, your Honor.

9 THE COURT: Okay.

10 MR. ALLEN: And I apologize, your Honor.
11 Did you want my argument with respect to the entire
12 search warrant, or just that specific point that
13 Mr. Saraceno just made?

14 THE COURT: No, with respect to -- I mean,
15 Mr. Saraceno, I take it, has reviewed both your
16 submissions, and Mr. Saraceno has concluded his
17 argument on the warrant.

18 MR. ALLEN: Yes, your Honor, thank you.
19 Your Honor, I believe the issue here is whether we
20 have a material omission in this affidavit, which
21 would have had an effect on the magistrate's
22 finding of probable cause. First, your Honor, it
23 is the government's position that there is not a
24 material omission here. The government put in its
25 response that it is correct that investigators did

1 not see the defendant in the limited surveillance
2 video that was reviewed. The reason that the
3 surveillance video that was reviewed was limited is
4 because this 15-year-old girl could not articulate
5 the route that was taken while she was in the
6 defendant's vehicle. As a result, there were a
7 number of possible Dollar Store locations that they
8 could have stopped at.

9 The investigators did identify particular
10 Dollar Store locations, but ultimately they
11 couldn't pinpoint the specific time, they couldn't
12 pinpoint the specific store. It was -- at that
13 point it was proving to be an inefficient method of
14 investigating this case, especially when they knew
15 that there were so many other avenues to
16 approach -- to take in order to corroborate SJ's
17 account of events.

18 Your Honor, this is not a material omission
19 that was left out of the affidavit. Their
20 inability to see the defendant in surveillance
21 tapes was merely an unproductive and unsuccessful
22 effort in the course of their investigation, which
23 the Smith case specifically says is not necessary
24 from the affidavit.

25 However, your Honor, putting all of that aside,

1 even if that was a material omission, the amount of
2 probable cause linking this back to the defendant
3 is overwhelming, your Honor, and that's detailed in
4 the government's response. First and foremost,
5 your Honor, the investigators, with the consent of
6 SJ, took over her identity on her Meetme.com
7 profile. Through that profile they contacted the
8 defendant, and he was asked to call them at a
9 specific number. The number from which the
10 defendant contacted law enforcement tied directly
11 back to the defendant's house on Byron Avenue,
12 which is where the defendant resided.

13 Furthermore, through subpoenas law enforcement
14 was able to determine that the Meetme.com profile,
15 MixMasters;D, was tied back to a Gmail account,
16 RyanBraden8@Gmail. Both the Meetme.com profile and
17 the Gmail account were traced back to an IP
18 address, and that IP address, like the phone
19 number, your Honor, was traced back to 42 Byron
20 Avenue, which was the residence of the defendant
21 Jason Smith. With that information, there was
22 probable cause to determine that it was, in fact,
23 the defendant Jason Smith who had the sexual
24 encounter with this minor female.

25 But there was more, your Honor. In addition,

1 SJ, the minor female, she positively ID'd the
2 defendant in a photo lineup, which included eight
3 photo arrays, and she positively identified the
4 defendant's residence, because the house was posted
5 on Zillow.com. In other words, your Honor, the
6 probable cause linking this back to the defendant
7 was overwhelming, and had the -- had the
8 unsuccessful efforts of the investigators been
9 included in the affidavit that went to the
10 magistrate judge been included, it would not have
11 affected her determination of probable cause, your
12 Honor.

13 Further, I'd like to add that there's
14 absolutely no showing of bad faith on any
15 investigators here in putting that point in. The
16 motion is simply conclusory.

17 THE COURT: Okay. Thank you. Just one
18 question, and maybe it's not directly relevant to
19 what either of you are arguing. But I just notice
20 in reviewing the search warrant application, the
21 address is blacked out on the affidavit.

22 MR. ALLEN: Your Honor, in an effort to
23 protect the personal information of the defendant,
24 I personally blacked that out.

25 THE COURT: Okay. So that wasn't blacked

1 out when it was presented --

2 MR. ALLEN: Yes, your Honor.

3 THE COURT: -- to Judge Wolfgang.

4 MR. ALLEN: And if the Court would like an
5 unredacted copy, I could make --

6 THE COURT: No, no, no. I just wanted to
7 make sure it wasn't blacked out when it was
8 presented for signature.

9 You agree, Mr. Saraceno?

10 MR. SARACENO: I do agree, your Honor.
11 But I would point out that in reviewing the search
12 warrant application again, they don't even mention
13 in their application --

14 THE COURT: Would you just pull the -- or
15 get a little closer to the microphone.

16 MR. SARACENO: Sorry, Judge. It was
17 mentioned that the results of the rape test kit
18 were not back yet, and that's why the judge was not
19 told that they were negative for Mr. Smith's DNA.
20 But the search warrant application doesn't even
21 mention that the rape kit was done that night.

22 THE COURT: Okay. Now you wanted to
23 address also identification?

24 MR. SARACENO: Yes, Judge. With regard to
25 the photo array, not sure if you have --

1 THE COURT: Just a second. We don't have
2 that.

3 MR. SARACENO: I'm sorry, that's my fault,
4 because I didn't say I was going to talk about it
5 today, but then my client pointed out a couple of
6 things that I thought should be addressed.

7 THE COURT: Okay.

8 MR. SARACENO: Do you want me to hand this
9 one up?

10 THE COURT: Well, I'm going to want a
11 copy. Do you have an extra copy -- or, Debbie,
12 don't -- why can you make a copy, and, Mr. Allen,
13 you have a copy, right?

14 MR. SARACENO: Yes, your Honor.

15 THE COURT: Okay. Thanks.

16 MR. SARACENO: Thank you. Before I get to
17 this, I do want one more time just to point out
18 that the phone number in the police report is
19 different than the phone number in the government's
20 response. I don't know if they gave an explanation
21 for that or not.

22 THE COURT: I don't think your motion even
23 attached the police report, did it?

24 MR. ALLEN: No, your Honor.

25 THE COURT: Well, I'm basically -- I'm

1 going to focus what was raised in the motion. But
2 on the photo array, what were you going to say?

3 MR. SARACENO: With regard to that, I
4 didn't know -- when I was drafting my motion, I
5 didn't -- I didn't get that new -- that incorrect
6 phone number until I got their response, the 837
7 number. So I would have no way of knowing until I
8 got their response. I would have had to have
9 supplemented my motion.

10 THE COURT: All right. Then I'll give you
11 an opportunity to submit the police report and
12 supplement your motion briefly with respect to
13 that, and I'll give Mr. Allen an opportunity to
14 reply then.

15 MR. SARACENO: Thank you.

16 THE COURT: Okay. And I'll talk about the
17 time frame after we're done here. So --

18 MR. SARACENO: Okay.

19 THE COURT: -- on the array.

20 MR. SARACENO: Yes. With regard to the
21 array, it's clearly suggestive on its face. Most
22 of the men in the array look like they're in their
23 late 20s or early 30s, which is close to the age
24 that the defendant is now. But this is a picture
25 of him when he was 17 years old. I'd also point

1 out that the picture, if you compare it to the
2 picture above it, and the other ones to the left of
3 it is substantially wider. The border of the
4 picture is wider than the other ones, which would
5 draw -- which would make a viewer naturally drawn
6 to that picture as opposed to the other ones. And
7 that in conjunction with the fact that the one --
8 the picture that's circled looks like he's about
9 half the age of the other people, also makes it
10 unduly suggestive.

11 THE COURT: Okay. Oh, I'm sorry.

12 MR. SARACENO: Sorry. There's one more
13 thing. It's the only picture in which the
14 individual is smiling. The rest of the individuals
15 have very serious face expressions, if not frowns.
16 The 17-year-old is smiling in this picture.

17 THE COURT: Okay. Anything you want to
18 say, Mr. Allen?

19 MR. ALLEN: Nothing with respect to the
20 width of the photo. I will indicate or ask the
21 Court to take note that SJ was able to positively
22 identify the defendant, despite the fact that the
23 photo is rather dated. She was able -- you know,
24 she was able to identify him positively, even
25 though that photo is, you know, as the defense

1 counsel pointed out, even though he's much older
2 now closer to the time of the incident than he was
3 when he was depicted in this photograph.

4 THE COURT: Okay.

5 MR. ALLEN: If anything, I think that cuts
6 in favor of the government, your Honor.

7 THE COURT: All right. With respect to
8 the argument about the phone number and the police
9 report, Mr. Saraceno, I'll give you a week to
10 submit any -- a copy of a report and any further
11 argument that you wish on that. I'll give
12 Mr. Allen then a week from then to respond. And
13 then the motion will be deemed submitted.

14 MR. ALLEN: Yes, your Honor.

15 MR. SARACENO: Thank you, your Honor.

16 THE COURT: Okay.

17 MR. ALLEN: Your Honor, with respect to
18 that, and I understand why we're -- why defense --
19 the argument defense counsel is making why there's
20 another week. But I just point out that the number
21 of -- the 837 number was accurately reflected in
22 the affidavit. So the response was not the first
23 time that 837 ever appeared. I just want that to
24 be clear for the record, your Honor.

25 THE COURT: Okay. I understand, and I'll

1 consider the supplemental arguments in that light.

2 THE CLERK: Yes, your Honor.

3 THE COURT: Thank you both.

4 MR. ALLEN: Yes, your Honor.

5 MR. SARACENO: Thank you.

6 THE COURT: Defendant's remanded.

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CERTIFICATION

I certify that the foregoing is a
correct transcription, to the best of my
ability, from the electronic sound recording
of the proceedings in this matter.

s/Michelle L. McLaughlin
Michelle L. McLaughlin, RPR
Court Reporter